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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 896

FRANK MASHAK,
Petitioner,

vs.

DOROTHY DELORES PASTERNAK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Missouri.

FRANK MASHAK,
4114 Olive Street,
St. Louis, Missouri 63108,
Counsel for Petitioner.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri.

Petitioner Frank Mashak prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri entered on July 12, 1967.

OPINIONS BELOW.

The memorandum opinion of the Judge of the State Trial Court (R. 636 to 640) is unreported and is printed in Appendix B hereto, *infra*, p. A-9. The opinion of the

Supreme Court of Missouri (R. 698), printed in Appendix A hereto, *infra*, p. A1, is not yet reported as of December 6, 1967, and is anticipated to be reported in 419 or 420 S. W. 2d . . . (1967).

JURISDICTION.

The judgment of the Supreme Court of Missouri was entered on July 12, 1967 (R. 698). Motion for a rehearing or to transfer the case to the Court en banc was timely filed on July 26, 1967 (R. 707), and denied on September 11, 1967 (R. 710). An order staying the mandate of the Supreme Court of Missouri for ninety (90) days in which to petition this Court for a writ of certiorari was entered on September 15, 1967 (R. 711). Jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3), by the lower Court rejecting constitutional questions raised.

QUESTIONS PRESENTED.

1. Are the appellate courts of last resort in the respective States of the Union, subject to the requirement of "due process" and "equal protection" of the law as guaranteed by the Fourteenth Amendment to the United States Constitution, or may they refuse to consider and adjudicate constitutional questions timely raised on appeal and thereby effectively foreclose such rights to litigants?

2. Is the requirement of the Supreme Court of Missouri for a third jury trial of identical issues in this case, in the absence of evidentiary proof of the charges, after repeated refusals by the appellate courts to establish standards and guidelines herein, although repeatedly sought on prior appeals, a denial of due process and equal protection of the law by the State Judiciary under the Fourteenth Amendment, Section 1, to the United States Constitution?

3. When the same issues have been tried before two juries wherein plaintiff relied solely upon presumptions

unsupported by evidence and they were embodied in instructions to the jury without guidelines, although rebutted by overwhelming evidence and the verdict is in Defendant's favor, is not the requirement of a third jury trial without the Court establishing standards or guidelines a violation of due process and equal protection of the law?

4. Was the Supreme Court of Missouri justified in rejecting Petitioner's constitutional questions upon the vague and indefinite proscribing theory that: **"As applied in the case of an attorney, the presumption has a sound basis in public policy to discourage transactions between an attorney and client."**, which is without precedent or prior notice to the Bench and Bar, and not supported by any statute, or by any previously published Rules of Court, or by the Canons of Legal Ethics, or by any evidence of wrongdoing or undue influence, and without showing in any manner how public policy was offended, and is this not capricious and invidious discrimination a denial to lawyers as first-class citizens of equal rights?

5. May the Supreme Court of Missouri proclaim a new doctrine of Public Policy when it enunciates that a presumption of "undue influence" exists against a scrivener in a Will contest when said scrivener prepared a Will for his former client under her specific directions, and she executed it in the presence of an independent legal counsel she obtained and who advised her as to the import of its terms after questioning her as to her intentions and understanding of the Will and who acted as one of the two attesting witnesse she had personally procured, wherein the scrivener becomes a contingent-remainderman-beneficiary under this new restrictive doctrine of **"public policy to discourage transactions between an attorney and client"** in the absence of evidentiary proof of "undue influence" or of any "misconduct or wrongdoing" or of any "ac-

tivity in procuring the Will" and without the establishment of any safeguards or standards to guide the litigants, trial court and jury for a third jury trial without violation of due process and equal protection of the law?

6. May the Court substitute their arbitrary presumptions for evidence and declare as a matter of law in a Will contest that "undue influence is presumed" when it appears, (1) that a confidential or fiduciary relation existed between testatrix and contingent beneficiary; (2) that by the terms of the Will said contingent beneficiary might be given a substantial bequest; and, (3) that activity in procuring the Will is **presumed** when said beneficiary drafted the Will, without any evidence being adduced by Contestant to show either undue influence, misconduct or activity (which was formerly required in Missouri and in all other States) and in face of substantial rebuttal evidence which convinced the jury, the Supreme Court relying solely upon said discriminatory presumptions of undue influence affirmed the trial court's order for a new trial?

7. Did the Supreme Court of Missouri violate said constitutional requirements when it refused to consider the validity of a written instruction given to the jury on behalf of Contestant advising them "the law presumed undue influence" under such allegations and presumptions without first requiring a finding by supportive evidence of "undue influence" and "activity in procuring the Will" after Proponent had shown Testatrix was of sound mind and disposing memory and had testamentary capacity and who had independently directed the terms of the Will and had submitted said Will to the scrutiny of independent legal counsel chosen by her, and Proponent had affirmatively rebutted said allegations and presumptions by independent knowledgeable witnesses, which evidence was never surrebutted and the trial court permitted Contestant to argue to the jury inferences based on spec-

ulation and conjecture by reason of the embodiment of the alleged arbitrary presumptions in the instruction, which instruction the appellate courts of this State refused to consider or even mention when squarely raised, briefed and argued on two prior appeals in this case and granted another trial on such inferences upsetting a jury verdict for Proponent and must he now undergo a third jury trial without any adjudicated standards or guidelines, and devoid of evidence to support Contestant's allegations on presumptions alone?

CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitutional provisions involved are the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. U. S. C. A., Const. Amend. XIV, Section 1. The Amendment provides as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the 'aws."

STATEMENT.

Petitioner is the lawyer who prepared three of Testatrix' Wills and three reciprocal Wills for her husband in a period of more than twelve years according to their specific directions and was one of her contingent ultimate remainderman-beneficiaries. Their latest Wills were ex-

ecuted on July 3, 1957 and Testatrix whose Will is contested by her alleged granddaughter died over 29 months thereafter on December 22, 1959. Her husband, who had no other heirs, predeceased his wife on February 21, 1959 of an unusually rapid growth of lung cancer which was recognized and diagnosed after September 9, 1958 (R. 447). Contestant had lived with her mother in California since she was three years old. Testatrix lived in St. Louis, Missouri, for many years before Contestant's birth and died there. Contestant testified she had never seen, communicated with or in any manner heard from Testatrix, nor had she in any way gotten in touch with her during her lifetime, and that they were complete strangers to each other, although in 1952 she lived with an aunt and uncle in St. Louis for about a year, but never got in touch with Testatrix in any way nor was she interested in her (R. 298). Contestant never knew or saw Proponent until after this suit was filed (R. 309).

Contestant alleged in her petition filed September 19, 1960, that Testatrix was of unsound mind, was unduly influenced by Proponent when she made her Will because a confidential relationship existed between them as attorney and client, and that the Will was not duly proclaimed and attested as required by law, although she testified she had no knowledge of said averments (R. 312, 313, 314, 315, 316, 317). The case was tried to a jury the first time during the week of April 22, 1963 in the Circuit Court of the City of St. Louis, Contestant relying on the admission of Proponent that he drafted the Will, was an ultimate beneficiary of her estate, and that he had been her attorney for eight (8) years in prior litigation in Illinois and Missouri, wherein Testatrix and Proponent, and as the result thereof: Contestant, obtained an interest in a Jersey County Illinois Trust Estate, established by a decree of the Circuit Court in said County on July 6, 1953, through the initiation of litigation and the efforts of Testatrix

and her lawyer-Proponent; and that the latter two managed their interests in the farm together after the decree and until Testatrix' death. Contestant relied on a presumption of undue influence which was included in her written charge to the jury and argued all conceivable inferences based upon the presumptions from the date the Testatrix and Proponent met in July 1944 to the date of her death on December 22, 1959, without any evidence supporting undue influence at the time of making the Will or at any time. The jury set aside the Will and Proponent appealed the case to the Supreme Court of Missouri, **Pasternak v. Mashak**, Mo. Sup., 383 S. W. 2d 764 (1964), on the grounds that there was no evidence to support any of the averments made and that presumptions alone would not support her charges, and that the unsupported presumption of undue influence was prejudicial to Proponent when embodied in the written charge to the jury, and that the jury should have been required to make a finding of whether there was undue influence from the evidence.

Said Court transferred the appeal to the St. Louis Court of Appeals (intermediate appellate court) claiming the record did not affirmatively show that its minimum jurisdictional amount in excess of $15,000.00 was involved. The St. Louis Court of Appeals, **Pasternak v. Mashak**, Mo. App., 392 S. W. 2d 631 (1965), held the evidence did not support a submission on mental incapacity and reversed the case for retrial on undue influence, but pointedly refused to pass upon Contestant's instructions to the jury which issue Proponent raised, that embodying the presumption of undue influence therein was prejudicially erroneous and that there was no probative evidence submitted to the jury on undue influence, either. The Court completely ignored the attacks on Contestant's presumptive instructions which were thoroughly briefed and argued.

Although the Supreme Court of Missouri has promulgated approved instructions in almost all jury cases, known as Missouri Approved Instructions (MAI), to date no approved instructions exist for Will contests and there are no guides on the subject, nor is there any legal authority in Missouri to include a presumption in an instruction to the jury, especially when there is rebuttal evidence. Said matters were raised in a Motion for New Trial, briefed and argued on appeal, and in a Supplemental brief in the St. Louis Court of Appeals after the case was transferred there, but said Court ignored them. It merely set forth, in **Pasternak v. Mashak**, Mo. App., 392 S. W. 2d 631, at 634 (3, 4): that "it has been the rule in this State that a presumption arises that the testator has been unduly influenced by the beneficiary charged therewith when evidence shows: (1) that a confidential relationship existed between the testator and the beneficiary; (2) that by the terms of the Will the fiduciary has been given a substantial bequest; and (3), that the fiduciary was active in procuring the Will. When supported by probative evidence the presumption makes a *prima facie* case which does not disappear upon the introduction of rebutting testimony because the presumption is a substantive rule of evidence and raises an issue for the jury." It further held Proponent freely admitted a confidential relationship, and that the Will itself was sufficient proof of the second element, and that any activity connected with the conception of the Will met the third element. The Court further held that direct proof is often difficult, if not impossible to obtain, hence the rule is that the fact may be proven by circumstantial evidence **(but none was adduced)**. No standards or guidelines were set forth in this new conception of the presumptions of undue influence and the Appellate Court refused to pass upon the challenges made by Appellant-Proponent to Contestant's alleged prejudicially erroneous

instructions including the presumption of undue influence. It was in this posture Proponent had to undergo a second jury trial, in a perplexed vacuum, totally without guidelines or standards on the presumptions and on the instructions (R. 548, 549).

At the second jury trial Contestant offered the testimony of four witnesses and herself. None of the witnesses testified to any facts relating to lack of testamentary capacity or of undue influence, Contestant again relying solely on the presumptions relating to undue influence. Proponent offered the testimony of eleven witnesses, including himself; Testatrix' personal physician for 11 years, who examined her one month after the execution of the Will and who testified she was of sound mind as of the date of the execution of the Will (R. 425); and the testimony of an independent legal counsel selected by Testatrix, who scrutinized the Will, examined her on the date of the execution thereof, as to her testamentary capacity, understanding of the import of its terms and as to her knowledge of the property involved, whereupon he consented to act as one of the two attesting Witnesses to the Will she had solicited (R. 113).

The verdict was for Proponent, upholding the Will. The Trial Court set it aside on Contestant's Motion for a New Trial because Proponent did not take the witness stand and Contestant was not allowed to comment to the jury on his failure to do so, and that two of Proponent's instructions were erroneous. Memorandum of the Trial Court, Appendix B, *infra*, p. A-9. Proponent appealed to the Supreme Court, which handed down its Opinion on July 12, 1967, Appendix A, *infra*, p. A-1. A summary of pertinent testimony of all witnesses is found in Appendix C, *infra*, p. A-12.

CONSTITUTIONAL QUESTIONS TIMELY RAISED.

The Federal Constitutional questions were timely and properly raised before the second jury trial in this case by Petitioner filing in the trial court a Petition for a Declaration of Rights and for a Declaratory Judgment, based on a denial of rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution (R. 16 to 26). The trial court was requested to adjudicate that the Contestant's case was devoid of evidence as shown by the record and that because the St. Louis Court of Appeals created new arbitrary presumptions substituting them for evidence and remanded the case for retrial on undue influence only, and that this action was a violation of his constitutional rights both under the State and Federal Constitutions (R. 21) which the trial court dismissed (R. 27). After the second jury trial the verdict was for Defendant-Proponent upholding the Will, and the trial court granted Contestant a new trial, Appendix B, *infra*, p. A-9. On the second appeal to the Supreme Court of Missouri the Federal constitutional questions were squarely raised, briefed and argued (R. 642, 660, 675), and were rejected by said Court (R. 701, 702), Appendix A, *infra*, p. A-1, and ignored by them in the Motion for a Rehearing or to Transfer the case to the Court *en Banc* (R. 707), which it denied (R. 710). **Pasternak v. Mashak**, Mo. Sup., 419-420 S. W. 2d ..., p. ....

REASONS FOR GRANTING THE WRIT.

1. If the appellate court of last resort in every State is subject to the requirement of the Due Process and Equal protection clauses of the Fourteenth Amendment to the United States Constitution, then such court should be required to pass upon all major issues timely raised on

appeal. The Missouri appellate courts have failed to do this on two prior appeals in the instant case and directed a third jury retrial of the identical major issues without establishing guidelines or standards.

If such practice is allowed to prevail, then the unjustness of this situation will continue to beset this Honorable Court with an endless stream of petitions for a writ of certiorari, which cannot be entertained as only a minute fraction of cases presented to this Court can be heard. Thus crucial issues raised in the State courts but ignored, will remain unresolved because the State Tribunals fail to perform their sworn duty to uphold the State and Federal Constitutions. They are cognizant of the small percentage of cases this Court can hear and take advantage of the situation.

The paramount reason for issuing the writ is that the issue tendered to this Court is the single most vital question raised in recent decades relative to the administration of justice throughout this Nation. It vitally affects all litigants in the State Courts in its practical consequences. **The question is the manner in which the State Courts administer justice.**

Respect for the administration of justice is the principal basis for the operation of a democratic society. Respect for the administration of justice is waning throughout the 50 States. In the last 25 years State Courts have become engulfed in the rising flood of cases engendered by the rapid increase in population, the multiplication of business transactions and the tardy recognition of basic personal rights. The Courts, the Bar, the litigants and **the people** are distressed by the infirmities and delays in the administration of justice.

The State Appellate Courts have not geared their efforts to mete out justice to a larger, more active populace. Greater efforts must be made by the State Courts to an-

swer litigants' questions promptly, providing proper guidelines and standards, and terminating litigation upon **established major principles** rather than prolonging repeated inquiries into trivialities, harmless errors and afterthoughts.

In this case the Court demands a third jury trial, without providing proper guidelines and standards for the litigants, upon newly invented Public Policy hastily conceived by the State Supreme Court.

State Appellate Courts in the past quarter of a century have become increasingly aware that the Supreme Court of the United States is the only arbiter available to correct their faulty procedures. Yet only a small fraction of the vast number of their cases have sufficient national significance to invoke the jurisdiction of this Court. The infirmities of the State Appellate Courts are therefor **relatively immune** from cure. Under the Constitution the duty of the State Courts is to provide adequate administration of justice in civil as well as in criminal cases and they must meet this responsibility, with **reasonable dispatch** in all cases and upon recognized principles.

Another reason for granting the writ is that due process and equal protection of the law has been denied by requiring too many trials. The right to a jury trial can be abused by the requirement of endless retrials of the same major issues without guidelines or standards upon the premise that minor points in the case might have altered the jury verdict, although no evidence had been presented by plaintiff to sustain the charges.

The next reason is that the embodiment of presumptions of wrongdoing in instructions to the jury, after failure to submit evidence of wrongdoing, and after said presumptions have been rebutted by evidence, constitutes an exception to the rule that innocence of wrongdoing is presumed until proven otherwise. Defendant proved he did

no wrong. Plaintiff had no testimony to offer to sustain her allegations. Now to upset a jury verdict on the ground that plaintiff was not allowed to comment to the jury that defendant did not take the stand in the second jury trial, when plaintiff read defendant's answers to interrogatories, and his testimony from the first trial, is to violate due process and equal protection. There must be an end to trials of major issues somewhere, to prevent the build-up of back-logs of ancient cases, if there is to be due process. Due process and equal protection does not allow trivial afterthoughts to upset jury verdicts.

State appellate courts should be required to meet squarely and answer the major points raised on appeal. It is not due process and equal protection for the courts pointedly to ignore repeated requests for guidelines, standards and safeguards when establishing new law on major issues which depart markedly from the established law of many years standing. Defendant has three times requested standards and guidelines for the trial of the major questions raised on undue influence and also on the question of embodying presumptions in the instructions after they have been rebutted. **Pasternak v. Mashak**, Mo. Sup. (1964), 383 S. W. 2d 760; **Pasternak v. Mashak**, Mo. App. (1965), 392 S. W. 2d 631; **Pasternak v. Mashak**, Mo. Sup. (1967), 419-420 S. W. 2d ..... Three times petitioner has been denied adjudication of these major points. For the court to require him to retry these same major issues by the court raising insignificant and false issues in the absence of any standards and guidelines and without supporting evidence of the charges of undue influence is a denial of due process and equal protection of the law.

Another cardinal reason for the issuance of the writ is that the opinion in the court below is a landmark decision in Missouri having far-reaching effects on all fiduciaries and particularly lawyers; and establishes a fallacious

precedent for all courts in the United States. This decision is contrary to all the past established rules applying to undue influence and misconduct by attorney-fiduciaries. Previously, in the presence of testamentary capacity and proof of proper execution of the Will, absent **proof** of undue influence, a testator could dispose of his property to anyone, including his fiduciary.

Under this decision, no proof of undue influence or misconduct is necessary. The fiduciary who inherits under a Will is presumed to have exerted undue influence even in the absence of any proof. The court's decision has shifted the burden of proof from plaintiff to defendant. Further, when he has rebutted the presumptions and has submitted independent proofs, including the testimony of an independent attorney to whom the Will was submitted for scrutiny by Testatrix and who examined the Testatrix as to testamentary capacity, intent and understanding of the effect of the Will, even when a jury has heard the rebutted presumptions of undue influence embodied in instructions, but has decided in favor of the Proponent, even then the courts will not accept the jury verdict.

The Supreme Court of Missouri for want of any legal basis for its opinion, has promulgated a new doctrine in its decision that ". . . transactions between an attorney and client are to be discouraged", and stated that this doctrine "has a sound basis in public policy". There are no guidelines, standards, or rules established by the Court in this sudden reversal of the entire body of the law established through the years.

As a result, fiduciaries, lawyers, judges, and testators are placed in the position that there is no manner in which a testator may leave a bequest to his fiduciary. A mere unsupported challenge by any heir-at-law of testator invokes the insurmountable presumption of misconduct on the part of the fiduciary, and rebuttal evidence offered in

face of **no** evidence of misconduct to support the presumption, although Proponent's evidence convinced the jury, is not sufficient to convince the court that these arbitrary and capricious presumptions are patently wrong.

The decision of the Court below decided nothing. None of the major issues presented by Proponent were commented upon. The Supreme Court of Missouri has substituted its new doctrine for the verdict of the jury, although there was nothing to use as a basis for the doctrine except the rebutted presumptions and the vague "public policy" theory. The result is that all fiduciaries who might inherit from clients, patients or others, or from former clients, patients or benefactors, are automatically presumed guilty of misconduct, even **after** they have proven themselves innocent, a situation without precedent in the law.

This is the only situation in the law in this country in which a party is presumed guilty of undue influence and misconduct **after** he has been proven innocent. It is a direct violation of the rights of a large class of persons, namely: fiduciaries, and denies them the same due process and equal protection of the law as is guaranteed to every citizen under the United States Constitution. A denial of such rights to a large class of citizens raises a significant Federal constitutional question under the Fourteenth Amendment to the United States Constitution for which the proper remedy is a writ of certiorari issued by this Honorable Court to the Supreme Court of Missouri for appropriate action.

2. This latest decision goes far beyond any previous interpretations of the tests for "undue influence." Under the present decision the presumption of undue influence has become indisputable and cannot be controverted, which is contrary to all precedent founded upon theoretical and fictitious assumptions of guilt without evi-

dentiary support of misconduct and Contestant's case is totally devoid of relevant evidence. **Adderley v. State of Florida**, 385 U. S. 39, 44 (Appendix C, *infra*, p. A-12). It is predicated on a false premise, creating a web of conjectural inferences emanating from ordinary conduct to suggest suspicions even though not remotely connected with the time of the execution of the Will. This is especially true when such presumptions are included in the written instruction to the jury, because the Courts have not provided any safeguards or standards to protect the defendant and guide the trial court and jury, so that it is difficult if not impossible for a defendant to prepare a defense against such general abstract assumptions and leaves judges and juries free to decide the case on their whims without legally fixed standards and permits mere speculations on accusations to defeat an innocent party in court, because the arbitrary presumptions contained therein suggest a finding of undue influence even though not supported by any evidence, as they are proclaimed by the trial court to be the law authorizing the jury to find against Proponent even though the presumptions are destroyed by overwhelming rebuttal evidence. The jury looking to the Bench for the law, would naturally take it that such a declaration was binding upon them. **Giaccio v. Pennsylvania**, 382 U. S. 399, 404; **Speiser v. Randall**, 357 U. S. 513, 520.

Under prior decisions the presumption of undue influence must be founded upon evidence to be adduced by Contestant of misconduct by a Proponent which could be rebutted in a Will contest. In the present case there was **no** evidence of misconduct or undue influence presented by Contestant to constitute a basis for the presumptions invoked. Hence there was no requirement for rebuttal evidence. Nonetheless, Proponent, being caught under the shifted burden of proof caused by the novel prior decision in this case in the first appeal, **Pasternak**

v. **Mashak**, Mo. App., 392 S. W. 2d 631 at 636 (3, 4), offered substantial independent rebuttal evidence against the unsupported presumptions which emasculated them (R. 83, 110, 335, 358, 396, 420, 481, 503, 522). The jury held for Proponent and sustained the validity of the Will. This verdict the trial court set aside on Contestant's Motion for a New Trial because Proponent did not take the witness stand but permitted his testimony from the previous trial to be read to the jury and because Contestant was not allowed to comment to the jury in argument for his failure to do so, and that two of Proponent's instructions were erroneous. Memorandum of Trial Court, Appendix B, *infra*, p. A-9. The raising of such trivial issues would fall within the realm of the harmless error rule, because Contestant presented no evidence to support her allegations and the verdict of the jury was for the right party.

3. Proponent appealed the case to the Missouri Supreme Court a second time, claiming Contestant had failed to make a *prima facie* case because devoid of evidence of misconduct, undue influence or activity in allegedly procuring the Will, and that ten independent knowledgeable witnesses for Proponent, and independent legal counsel, offered substantial corroborative evidence which destroyed the arbitrary presumptions, and that it did not make any difference whether Proponent took the stand or not because independent witnesses exonerated him, and that the instructions claimed by the Court to be erroneous were not in fact so; but were only converse instructions given by Proponent to offset the prejudicial instruction given on behalf of Contestant which addressed the jury by the trial judge, that the "law presumed undue influence" when certain normal facts appeared, and gave license to the jury to wrongfully draw malefic inferences therefrom. Proponent argued that the arbitrary suppositions did not make a case for the jury, but permitted

speculation and conjecture of wrongdoing based on allegations which were not evidence, and that the substantial probative evidence offered on behalf of Proponent convinced the jury which is the trier of fact.

Contestant's case consisted of piling of one suspicious presumption upon another arbitrary supposition to draw discriminatory inferences therefrom without evidentiary support of wrongdoing or misconduct, and that there was no legitimate case made against Proponent that would justify the Contestant to comment to the jury for his failure to take the witness stand when Contestant had read Proponent's testimony in the previous trial of the same issues to the jury; as comment is not proof and Proponent cited several cases of the Missouri Supreme Court which so held. **Talley v. Richard,** Mo. Sup., 185 S. W. 2d 23, 27 (10). No defendant is charged to speak until the plaintiff has introduced evidence, which unexplained, makes a case against him. **Tilton v. Woods,** 371 S. W. 2d 291, 297 (3); **Graham v. Conner,** Mo. App., 412 S. W. 2d 193, 203 (15-18). The court refused to reconsider its ruling which is in conflict with its prior decision in **Bostwick v. Freeman,** Mo. Sup., 160 S. W. 2d 713, 718 (2), raised in the Motion for Rehearing or to Transfer the case to the Court *en Banc* (R. 707), that a party may not have the use of a deposition and the right to comment to the jury for the failure of the other party to testify, and did not overrule said case or distinguish it on the facts in this case (R. 708). Contestant had failed to prove any of her allegations, and independent rebuttal witnesses destroyed the naked presumptions relied upon by her (R. 335, 358, 396, 420, 481, 503, 522). Proponent contended that the trial court should have directed a verdict for Defendant-Proponent because Contestant had failed to make a submissible case for the jury (R. 547, 660, 674).

The instructions given to the jury on behalf of Proponent-Appellant were not erroneous because they were merely given to counteract the prejudicially erroneous Instruction No. 5 (R. 559) for Contestant which embodied the shift of the burden of proof and which stated the "law presumed undue influence" by including three purported presumptions therein which had been rebutted by cogent, substantial and probative evidence including the transcript (R. 107) of testimony of independent legal counsel, who advised Testatrix as to the import and terms of the Will and after questioning her as to her intentions and understanding, and who acted as one of the attesting witnesses whom she had voluntarily procured herself (R. 113). The Missouri Supreme Court camouflaged and avoided the probative evidence for Proponent in its opinion and made sinister imputations against him that **"his conduct was the issue"** (although numerous witnesses had testified as to his conduct and convinced the jury of his innocence), Appendix A, *infra*, p. A-1, 419-420 S. W. 2d ..., and not the question of undue influence which purportedly was being tried; and inferred wrongful conduct, or conduct unbecoming an attorney which could be construed in a third trial that his conduct was wicked, fraudulent or even criminal without any such evidence in the case.

The opinion **erroneously** states that the evidence offered by Proponent in the second jury trial was **substantially the same** as set out in the first decision of the St. Louis Court of Appeals (**Pasternak v. Mashak**, Mo. App., 392 S. W. 2d 631), which is not a fact. In that trial Proponent testified, and the two attesting witnesses, one of whom was the independent legal counsel consulted by Testatrix, and to whom she submitted the Will and who both examined and advised her at the time of the execution of the Will, and Testatrix of her own volition procured both of the witnesses and not Proponent (R. 89,

90, 91, 103, 113). In the second trial, Contestant had the complete transcript of record from the first trial to use, Proponent's deposition and his Answers to Interrogatories (Answered over objection, R. 27 to 30) from which Contestant read to the jury—in fact, reiterated, because the same things were read to the jury from the deposition, and Answers to the Interrogatories, for emphasis; then she offered in evidence and passed to the jury for inspection two revoked Wills, a quit claim deed and the contingent fee contract executed by Testatrix and Proponent on August 29, 1944, all which had no relevancy to the time of execution of the contested Will on July 3, 1957, to prove undue influence, and which Contestant claimed to be admissions against interest, but which was in fact mere normal conduct of Testatrix and Proponent and so recognized by the jury. The Court in its opinion completely omits the testimony of ten independent knowledgeable witnesses who testified on behalf of Proponent on the second trial (R. 83, 110, 358, 396, 481, 486, 503, 522, 539), and the testimony of Testatrix' personal physician for eleven (11) years (R. 423), and merely sets out selected excerpts of one of the attesting witnesses (Dorothy Stallings), and ignores the crucial portion of her testimony relative to Testatrix' intention (R. 88), and disregards the testimony of all others including independent legal counsel, Mr. Walker; then asserts suspicious innuendo from the association of Testatrix and her husband, with Proponent-beneficiary from July, 1944, when the parties first met, until the Testatrix' death on December 22, 1959.

Other serious questions raised by Proponent on admission of hearsay testimony admitted for Contestant over objection, "which was not *res gestae* because purportedly made more than five years before the execution of the Will" by Contestant's guardian *ad litem* and later her substituted guardian's attorney, before the July 6, 1953

court decree was entered (R. 161), and some purportedly made by Testatrix (after her husband died on February 21, 1959) which was over 19 months after the Will was executed (R. 168, 169, 173), and were challenged on the grounds it would permit impeachment by parol evidence of a Will which by statute must be in writing, and inadmissible; and the various attacks made on the psuedo presumptions, all which were never mentioned and carefully disregarded in the opinion. This opinion adopted the opinion of the St. Louis Court of Appeals, **Pasternak v. Mashak**, Mo. App., 392 S. W. 2d 631, which was attacked and complained of on this second appeal to the Missouri Supreme Court, which at page 636 (3, 4) reverses and makes more burdensome the previous *en Banc* decision of said Court, a landmark and final authority on the subject of undue influence in Will contests until then: **Loehr v. Starke** (1932), 332 Mo. 131, 56 S. W. 2d 772, which held a confidential relation alone did not warrant a presumption of undue influence, but that there had to be evidence to support it, and if such facts appeared in evidence the presumption remained in the case for submission to the jury but might be rebutted. The St. Louis Court of Appeals, in **Pasternak v. Mashak**, *supra*, 392 S. W. 2d 631, 636 (3, 4), held the presumption was a rebuttable one, but arbitrarily added two more presumptions: (2) **"that by the terms of the Will the fiduciary had been given a substantial bequest; and (3), the fiduciary was active in procuring the Will, and if supported by probative evidence, a prima facie case was made for the jury."** (The latter was not supported by any evidence.) This addition had a retroactive effect, as well as a prospective effect. Neither the first **Pasternak** case, nor the present opinion sets out any standards or safeguards to guide the litigants, trial court or jury as to how the two additional presumptions were to be applied in another retrial of this case and leaves the

Proponent and the trial court in the same revolving door situation that existed in the two previous trials. In the last jury trial the Judge was in a quandry on the giving of instructions on undue influence because there were no guidelines, and the Court and the parties were confused by the St. Louis Court of Appeals decision in **Pasternak v. Mashak**, Mo. App., 392 S. W. 2d 631, 634 (3, 4), embracing the three presumptions (R. 548, 565, 567, 568). The appellate court had failed to pass on or decide Proponent's questions that presumptions should not be included in written instructions to the jury which made them more onerous and allowed speculation and conjecture on mere accusations with the Court's sanction when not supported by evidence without standards or guidelines (R. 659, 673).

The phrase "substantial bequest" is a relative term, and no measuring rod was devised to aid the parties, trial court and jury to determine what it meant without speculation and conjecture; **or how the amount of the bequest** would have anything to do with the charged issue of undue influence, and unless some relevant reason could be shown to warrant such a conclusion, it should have not been given to the jury nor did it have any relevancy to the allegations of undue influence, but the appellate court had stated that was an element of undue influence in its new conception of the charge. Nor did the appellate court make any guide or standard as to what constituted "activity in procuring the Will," which was completely devoid of any evidence to support such submission to the jury, but it did say that composition and supervision in the preparation of the Will was sufficient. Thus the Court disregarded the intention, wishes and desires of Testatrix, her mental capacity to make a Will and complete freedom from any exercise or solicitation or evidence of undue influence on the part of Proponent, and the total absence of any such evidence,

direct or circumstantial, and omitting to mention the presence, scrutiny, counselling and questioning by independent legal counsel who also served as one of the attesting witnesses to the Will (R. 114). A Will cannot be set aside on mere accusations or upon unproven allegations when Testatrix is mentally competent, not *in extremis,* and fully aware of her actions when voluntarily making a disposition of her property as she sees fit. **Beyer v. LeFevre,** 186 U. S. 114, 124, 125.

The decision by the Supreme Court of Missouri violates the Due Process and Equal Protection clauses because of the vagueness and absence of any standards in its newly proclaimed doctrine sufficient to enable the Proponent, lawyers, fiduciaries and others in the future to protect themselves against imaginary and invidious discriminatory inferences from presumptions without evidentiary support which are now made absolute even when rebutted. Such judicial fiats are prohibited by the United States Constitution in both civil and penal cases. **Giaccio v. Pennsylvania,** 382 U. S. 399, pp. 402, 405. The Supreme Court of Missouri on the second appeal disregarded its own authorities cited by Proponent and refused to pass upon the crucial questions of the alleged prejudicially erroneous inclusion of the three arbitrary presumptions in the instructions, but preempted the Proponent's appeal by flatly declaring Contestant's rights were violated by Proponent's instructions which it said were in conflict with her alleged prejudicially erroneous instruction embracing all the presumptions complained of.

Under the Fourteenth Amendment Proponent-appellant was entitled to have the validity of Contestant's theory considered as the case was tried and as the issues were determined in the trial court both in the absence of evidence to make a *prima facie* case, and the substitution of presumptions in lieu of evidence, and the inclusion of such

assumptions in written instructions to the jury, **Cole v. Arkansas**, 333 U. S. 196, 202; **Lawrence v. State Tax Comm.**, 286 U. S. 276, at 282, because to be required to undergo a third jury trial without the establishment of any guidelines or safeguards in trying the identical major questions twice previously tried would be futile and would require a third appeal; then, Proponent will be confronted with this precedent as *res adjudicata* and end in the defeat of his constitutional rights. Thus fiduciaries in Missouri will be barred from receiving any bequests from their clients and patients or from their former clients and patients, and also in other fiduciary relationships, under any circumstances in the future, based on mere accusations founded upon arbitrary and capricious presumptions of undue influence. The Supreme Court of Missouri has left the Bench, Bar and public in a dilemma in its refusal to consider these major questions presented in Proponent's appeals and in his Motion for a Rehearing or to Transfer the case to the Court *en banc* (R. 707, 710). A Will of a person of sound mind and memory cannot be set aside on mere accusations or on unproven allegations, of undue influence. **Beyer v. LeFevre**, 186 U. S. 114, 124, 125.

4. Proponent's constitutional questions were rejected by the Supreme Court of Missouri on the grounds, so it said that the complained of presumptions "**had a sound basis in public policy to discourage transactions between an attorney and client.**" Appendix A, p. A-1, 419-420 S. W. 2d .... Lawyers are are also first-class citizens and should be entitled to the equal protection of the law, **Spevak v. Klein**, 385 U. S. 511, 516. Without a transaction an attorney has no client. The Court did not elaborate how or in what manner Petitioner's conduct offended public policy. Being without any basis therefor the statement in the opinion that "**his conduct was the issue**" maligns his character and is a judicial libel of his professional reputa-

tion. This doctrine implies lawyers are dishonest and cannot be trusted, and impugns the integrity of the Courts, since Judges are first attorneys.

This new judicial fiat is without precedent in the law, without any prior notice to the Bench and Bar, is not supported by any statute, any previously published Rules of Court, or the Canons of Legal Ethics, or any accepted definition of Public Policy, or any evidence of wrongdoing or undue influence and is an invidious discrimination again Petitioner, lawyers and fiduciaries as a class which arbitrarily denies them the equal protection of the law.

5. The Missouri Supreme Court has failed to explain how or in what manner its own established definition of Public Policy was violated to support its proclamation that Petitioner had in any conceivable way violated Public Policy, as set out in **Brawner v. Brawner**, Mo. Sup. *(en Banc)*, 327 S. W. 2d 808, 812 (5): "While a precise definition of the term public policy presents difficulty, it is generally said to be that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against public good; it is synonymous with the "policy of the law" and "the public good." Similar definitions are universally approved by the Courts.

This Court has held, **Fullinwider v. Southern Pac. R. R. Co.**, 248 U. S. 409, at 412: "A policy, if it exists, may be used to resolve an uncertainty of a law, but it cannot be a substitute for a law." There is no public policy condemning the receipt of a bequest by one who stood in a fiduciary relationship to the giver. Such a policy would impose unwarranted restriction of the testamentary alienation of property and would prevent a testator from voluntarily bestowing gifts on his closest friends and confidants, who often have stronger than kinsmen's claims on his bounty as is apparent in this case (R. 298). **Wade v.**

Kirksville College, Mo. Sup., 270 S. W. 2d 811, 814 (2). This Court has held in **Buchanan v. Warley**, 245 U. S. 60, at p. 74, that the Fourteenth Amendment protects life, liberty and property from invasion by the States without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. The constitutional protection against deprivation of property without due process of law would certainly be available to persons arbitrarily deprived of their private rights by such State action, whether under the guise of Legislative authority or otherwise, p. 220 in **Wagner v. Baltimore**, 239 U. S. 207.

Missouri has never established such public policy by Legislative action and Courts of this State should not have authority by judicial fiat to do so unsupported by evidence of wrongdoing, undue influence, justifiable reasons or any valid law, and by failing to point out just what Petitioner did that was injurious to public policy or the public good or how the image of the Bar or the Courts was hurt in any way. The function of the State Supreme Court is to adjudicate, not legislate. **State v. Champ**, Mo. Sup. (*Banc*), 393 S. W. 2d 516, 526 (4). The constitutional rights here violated are immediate and present, and the State Court is not justified in denying them on the basis that "transactions between an attorney and client are to be discouraged" either now or prospectively, which is not a valid reason. **Watson v. Memphis**, 373 U. S. 526, 533, 535.

6. The crucial issue is and has been since the inception of this case whether a plaintiff may prove his allegations of "undue influence" by theoretical presumptions instead of evidence; and may the Court declare as a matter of law in a Will contest, as proclaimed in this new doctrine

to "discourage transactions between an attorney and client" that, "undue influence is presumed" when it appears (1) that a confidential or fiduciary relation existed between a testator and beneficiary; (2) that by the terms of the Will said beneficiary is given a substantial bequest, and (3) that activity in procuring the Will is presumed when said beneficiary wrote the Will. Such doctrine prejudges guilt without evidence to prove the allegations. If such dogmatic doctrine may be established by a Court on the flimsy excuse "that it has a sound basis in public policy," without the establishment of any standards, guidelines or exceptions regardless of the circumstances, then when such facts appear in a case the trial court could direct a verdict for Contestant no matter how innocent of wrongdoing a proponent may be, because there would be no reason to submit the case to a jury on this unjust three-horned presumptive dilemma without guidelines which would become absolute. The declaration by the courts in prior cases that the presumption of undue influence is rebuttable, has resulted in a will-o'-the-wisp situation to discourage transactions between an attorney and client. If phantom judicial presumptions may be used in place of evidence to defeat innocence of wrongdoing, then the Fourteenth Amendment has been eroded to the point of abandonment, because in this case proponent's evidence completely vanquished the presumptions relied on by contestant in spite of their lack of guidelines or standards and under their new doctrine wherein contestant has no burden of proof.

The indefinite prolongation of a speedy determination of the same issues and the court's failure to establish standards and guidelines, but requiring a third trial without supporting evidence relying upon presumptions to support the charges, and a refusal by the court to adjudicate the major issues and the constitutional questions raised on appeal is an unjust denial of due process guar-

anteed by the Ninth and Fourteenth Amendments to the United States Constitution, even though this is a **civil case,** all citizens should be accorded at least the same rights guaranteed in criminal trials, if there is to be equal justice under the law. **Griswold v. Connecticut,** 381 U. S. 479, 484; **Klopper v. North Carolina,** 386 U. S. 213, 222, 223, 224, 225.

A presumption is not evidence, it may not be true as a matter of fact. It is but a substitute for the lack of anything better. Nor can it stand or be weighed against evidence, **Wigmore on Evidence,** Vol. IX, 3rd Ed., p. 288, § 2491. A presumption cannot stand in the face of positive proof to the contrary; and where the plaintiff has relied on such presumption and it has been opposed by positive evidence to the contrary, he must then produce evidence tending to disprove the defendant's positive testimony, or his *prima facie* case will fall. Presumptions are bats of the law, which the light of evidence frightens and causes to fly away. Unless there is substantial evidence of facts which exclude every other hypothesis but that of wrongdoing, it is the duty of the trial judge to instruct the jury to return a verdict for defendant, and, where all the evidence is as consistent with innocence as guilt, it is the duty of the Court to reverse a judgment against the person accused.

This Court at an early date, in **United States v. Ross,** 92 U. S. 281, 283 (1875) had established the principle that a verdict cannot be predicated upon inferences or upon presumptions resting on the basis of other presumptions. Such pyramided inferences are too remote to constitute evidence. No inference of fact or of law is reliable drawn from premises which are uncertain. A myriad of courts, both Federal and State, have followed this decision for over 90 years throughout the Nation. However, in a few criminal cases several United States Circuit Courts of Appeal have modified the principle. In **Devore v. United States,** 368 F. 2d 396 (9th Cir. 1966) at p. 399, the Court

held: "The old rule laid out in **United States v. Ross**, 92 U. S. 281, 283, that an inference predicated upon an inference is inadmissible has been repudiated. The acceptability of the inference drawn turns on whether it has been founded on 'fact' regardless of whether such fact has been arrived at by direct or circumstantial evidence." **Toliver v. United States**, 224 F. 2d 742, 745 (9th Cir. 1955). "The rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends upon another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt. **Dirring v. United States**, 328 F. 2d 512, 515 (1st Cir. 1964)." In this case there was no evidence, circumstantial or otherwise, adduced to support the arbitrary and unreasonable presumptions to draw inferences therefrom. Appendix C, p. A-12.

Presumptions may be invoked to impel a conclusion in the absence of evidence to the contrary, but when such evidence appears the presumption ends. Inferences may not be based on other inferences without supporting evidence. The burden of proof never shifts and was on Contestant *ab initio*, and she failed to make a *prima facie* or submissible case. **Kapp v. E. I. DuPont De Nemours & Co.**, 57 Fed. Supp. 32, 38, 39 (11); **Guaranty Trust Co. v. United States**, 44 Fed. Supp. 417, 419 (1-5). The presumptions and inferences used by the Contestant were fully and completely destroyed by Proponent's evidence and the jury's verdict was for the right party—the Proponent.

7. Petitioner's Constitutional rights were denied when on two prior appeals the Appellate Courts of Missouri refused to pass on Contestant's alleged prejudicially erroneous instructions to the jury raised by Proponent. Es-

pecially since it held a third jury trial was necessary and arbitrarily refused to set out any standards or guidelines. It merely stated Proponent's Instructions No. 9 and No. 10 were in conflict with Contestant's Instruction No. 5 which was under direct attack by Proponent. The Court did not say said offending instruction was correct; in fact, it completely ignored the charges leveled against it and disregarded its own decisions cited by Proponent that it was prejudicially erroneous. The instruction follows, verbatim:

> "The Court instructs the jury that a Will, in favor of a person standing in a confidential or fiduciary relationship by which the beneficiary thereof receives a substantial benefit, and who was active in procuring the execution thereof, is presumed in law to have been made under undue influence exercised by such beneficiary, but that this presumption of law may be rebutted by proof of the proposition that there was not undue influence exercised by the beneficiary under the Will (not in M. A. I.)" (R. 559).

Presumptions should not be submitted to a jury. They are questions of law for the Court to determine, and should not be included in the charge to the jury to supply a crutch in lieu of evidence. Contestant did not produce one iota of evidence of "undue influence", or "activity" or of any wrong-doing. Since a Will contest is an ordinary action at law, the appellate courts of Missouri place the burden of proof upon Contestant to show undue influence and mental incapacity, **Switzer v. Switzer**, Mo. Sup., 373 S. W. 2d 930, at 932; **Martin v. O'Connor**, Mo. Sup., 406 S. W. 2d 41, at 43 (5, 6). It is not the existence of undue influence but the exercise of it in the execution of the Will which invalidates such Will, **Glover v. Bruce**, Mo. Sup., 265 S. W. 2d 346, at 355 (5, 6, 9); **Baker v. Spears**, Mo. Sup., 210 S. W. 2d 13, at 17 (1-4). The complained of instruction No. 5 aforesaid did not require any finding of

"undue influence" when the Will was executed or circa, **but recited the law presumed it,** nor did it require any finding from the evidence that there was any "activity" by Proponent, thus neither requisite was supported by evidence. Said court had priorly held in **Switzer v. Switzer,** *supra,* 373 S. W. 2d 930, at p. 941, that an instruction failing to require a finding of "activity" was prejudicially erroneous. These cases were cited to the court but ignored. The Court simply assumed because Proponent composed and typed the Will, even though in accordance with Testatrix' specific directions (R. 88, 90, 102), that in itself constituted "activity" without requiring a finding by the jury how those normal functions of a lawyer in any manner unduly influenced Testatrix. The Testatrix made her own arrangements to procure her attesting witnesses, one of whom was an independent lawyer and who questioned her as to her intentions and understanding of the terms and contents of her Will before the execution thereof (R. 112, 113, 114).

Proponent's Instruction No. 9 (R. 560) was a converse instruction to Contestant's No. 5 (R. 559) advising the jury the burden of proof was upon Contestant to prove undue influence. It was calculated to offset the prejudicial effect engendered by the prejudicial presumptions submitted to the jury in Contestant's No. 5 Instruction aforesaid, and No. 10 was to guide the jury that the law did not require Testatrix to have the Will she directed to be made according to her wishes and desires reviewed or approved by others, than herself, if they so found (R. 561). It was an abstract instruction not prejudicial to Contestant, **Benham v. McCoy,** Mo. Sup., 213 S. W. 2d 921, at 920 (15, 17), because the three purported suppositions permitted inferences without evidence in argument to the jury, thus: "This case is dripping with evidence of undue influence" (R. 611), which was the strategy used in the first jury trial and had to be counteracted. The case of

State ex rel. v. Nelson, Mo. App., 203 S. W. 2d 115, loc. cit. 123, 124 (14-15) correctly rules and supports Proponent's attack on said Instruction which the Court ignored, supported by its early case of **Ham v. Barret,** 28 Mo. 388, 389, 390, also cited and disregarded as well as other cases cited (R. 659, 673). In the absence of evidence from which inferences may be drawn, the jury is not justified in indulging in mere unsupported conjectures, speculations or suspicions as to intentions which were not disclosed by any visible or tangible act, expression or circumstance of wrong-doing. The essential ingredients must be established by competent evidence, aided only by such inferences as might be logically derived from facts proved, and should not be subject to mere surmise or arbitrary assumptions, **Bailey v. Alabama,** 219 U. S. 219, 233, 244. No judicial standards have been provided and no public policy is reflected so as to give Equal Protection under the Fourteenth Amendment, **Baker v. Carr,** 369 U. S. 186, at p. 226; **Kunz v. New York,** 340 U. S. 290, 294. This doctrine does not rest on any reasonable basis, but is essentially arbitrary and condemns without fair adjudication when not supported by evidence or upon any fair policy, **Morey v. Dowd,** 354 U. S. 457, 464. Equal Protection is not achieved through indiscriminate imposition of inequalities, at p. 635, **Sweatt v. Painter,** 339 U. S. 629. In civil cases too this Court has struck down state statutes which unfairly shift the burden of proof, **Speiser v. Randall,** 357 U. S. 513, 520, at 524 citing **Western & Atl. R. Co. v. Henderson,** 279 U. S. 639, 643, at 644, where presumptions in that case were said to create an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate.

Proponent complained in the trial court (R. 28) and on the second appeal (R. 659, 673), of the admission in evidence of two prior Wills over objection, which had

been revoked by Testatrix by the contested Will (R. 243). The sole question for determination by the jury was "will or no will" and not matters such as a collateral attack upon a quitclaim deed or the validity of a contingent fee contract, **State v. Strother**, Mo. Sup. (*Banc*), 289 S. W. 73, 80 (12-13), 81 (14). The Court prominently mentions the consideration for a quitclaim deed in which Testatrix voluntarily conveyed her remainder one-sixth (1/6) interest in Jersey County, Illinois real estate on October 20, 1954, to her husband and Proponent, reserving the income therefrom during her lifetime for a recited consideration of "$1.00 and other valuable consideration" (the latter part of the consideration is not mentioned in the opinion to cast suspicion on Proponent), because a voluntary conveyance without consideration is valid between the parties, **Spaeth v. Larkin**, Mo. Sup., 325 S. W. 2d 767, 771 (4, 5); **Matonic v. Krajach**, 392 Ill. 547, 64 N. E. 2d 885, 889 (7), and the consideration mentioned in said deed was not irregular and is common in practice, legal and sufficient under the law, **Key v. Kilburn**, Mo. Sup., 228 S. W. 2d 731, 737 (11-12). In contrast, Contestant on May 17, 1955 sold her two-thirds (⅔) interest in the same tract of land for $35,000.00 (R. 322) for a recited consideration of "$10.00 and other valuable consideration" (R. 324), which interest originally resulted from the efforts of Testatrix and Proponent over an eight year period of litigation (R. 274).

The contingent fee contract Testatrix executed on August 29, 1944 with Proponent provided he would receive 50% of any amount recovered, and if nothing was recovered, he would not receive any compensation or fee (R. 233, 234). Nothing is mentioned about the complexity of the issues involved and appeals to the Illinois and Missouri Supreme Courts during the eight years of litigation (R. 272, 275). Said contract should not have been admitted in evidence because the making of a contract

creating a relationship of attorney and client is universally held not to involve a fiduciary relationship. None of the items mentioned had any relevancy or bearing on the issue of undue influence when the Will was executed on July 3, 1957, nor did Contestant produce any evidence to justify their admission as *res gestae.* The jury was not concerned with services rendered years before or their correctness during the prior years, but they were paraded before the jury to create suspicion, conjecture and speculation. The Supreme Court of Missouri seized upon them to include them in its opinion to insinuate improper conduct and to obscure the overwhelming evidence favorable to Proponent, and thus ignored the adjudication of the very questions raised before the Court. This is invidious discrimination and arbitrary denial of constitutional rights by the State Judiciary, **Shelley v. Kraemer,** 334 U. S. 1, loc. cit. 18, in refusing to consider and determine the chief points raised on the second appeal when it then exacts a third jury trial, thus permitting Contestant to repeat the same tactics, procedures, purported evidence deemed prejudicial and fallacious instructions without standards or guidelines *ad infinitum* without their adjudication before a third jury trial.

On December 30, 1966 the Missouri Supreme Court adopted and promulgated Canons of Judicial Ethics, effective March 1, 1967, Mo. Cases 407-408 S. W. 2d XIX, XXII, Appendix D, *infra,* p. A-22, including Rule 1.19, the Second paragraph thereof, states:

> "It is desirable that appellate courts in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions."

It is submitted that no reference to any statute, case, Rule of Court or Canon of Legal Ethics was made on the question of "undue influence" in the July 12, 1967 opinion of the Supreme Court of Missouri, in spite of the fact that this was itself a repetition of a previous jury trial of the identical issues. The same lack of guidelines exists and the Bench, Bar and litigants are in a revolving door situation. Every time they come out of the revolving door at the end of a jury trial, the Appellate Court directs Proponent to re-enter the revolving door routine to fight presumptive judicial shadows or penumbras which are unsupported by evidence, and still the Court has not provided any guidelines, standards, or approved jury instructions in this befuddled trek into the quicksands of legal ignorance (R. 565, 567, 569).

There was in neither of the previous jury trials an iota of evidence of testamentary incapacity at the time of the making of the Will, before, or after; nor was there a scintilla of evidence of undue influence produced by Contestant (Appendix C, *infra*, p. A-12, Summary of pertinent Testimony). The overwhelming weight of the evidence is for the Proponent of the Will, with eleven witnesses, including himself, and an independent legal counsel selected by Testatrix who scrutinized the Will, and who examined the Testatrix as to her testamentary capacity, her understanding and intent at the time of the execution of the Will before he consented to be an attesting witness (R. 110 to 114). The four witnesses produced for Contestant and herself, had not a shred of evidence to offer as to the lack of testamentary capacity or of undue influence (R. 155, 164, 187, 213, 278). The Supreme Court again has not commented on any of Proponent's evidence, and has ignored for the **second** time the identical **major** issues raised on this second trial as were raised on appeal after the first trial, and further it has ignored its own Rule 1.19 aforesaid, effective March 1,

1967, by affirming an Order of the trial Court for a New Trial on July 12, 1967, without indicating its views on major questions of law argued before them and necessarily arising in the controversy so that on a new jury trial, counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions. The requirement of a third jury trial in this identical situation by the Appellate Courts' refusal to adjudicate major issues raised on two appeals is a denial of due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution. If all State Appellate Courts performed their sworn duties, needless repetition in litigation would be reduced, and the administration of justice improved.

CONCLUSION.

For the reasons aforesaid, petitioner prays this petition for a writ of certiorari be granted.

Respectfully submitted,

FRANK MASHAK,
4114 Olive Street,
St. Louis, Missouri,
Counsel for Petitioner.

APPENDIX

APPENDIX A.

In the Supreme Court of Missouri,
Division Number One,
April Session, 1967.

Dorothy Delores Pasternak,
Plaintiff-Contestant
(Respondent),

vs.

Frank Mashak, and Frank Mashak, Executor of the Last Will and Testament of Elizabeth Milanko, Deceased,
Defendants-Proponents
(Appellants).

No. 52,413.
Filed
July 12, 1967.

Appeal From the Circuit Court of the City of St. Louis, Division No. 5.

The Honorable J. Casey Walsh, Judge.

This is an appeal by the proponents of a will from an order of the trial court, granting the contestant a new trial, following a jury verdict upholding the will. A previous appeal to this court involving the same will was transferred to the Court of Appeals because the record showed no basis for jurisdiction of this court. Pasternak v. Mashak, 383 S. W. 2d 760. The St. Louis Court of Appeals thereafter reversed the judgment in favor of the contestant. 392 S. W. 2d 631. At the ensuing retrial, evidence was presented that the net value of the estate exceeds $15,000. The jurisdiction of this court is thus established.

The will in question was executed by Elizabeth Milanko on July 3, 1957. Mrs. Milanko died on December 22, 1959. The will was prepared by the proponent, Frank Mashak, a

St. Louis attorney. The will devised and bequeathed the entire estate to Mashak, in trust for the testatrix' husband, Savo Milanko, for his life. Upon the death of the husband, the entire estate went to Mashak or his heirs if he predeceased Savo. Mashak was named executor, without bond. Savo Milanko predeceased the testatrix.

The contestant is the testatrix' sole heir at law. She is the daughter of the only child of the testatrix, a son by a prior marriage. She was born November 22, 1936. Her parents were divorced in 1938 and the custody of the contestant awarded to her mother. Contestant moved with her mother to the State of California at the age of three years and has lived there ever since.

On the retrial, the issue submitted to the jury was whether the will was the result of undue influence by Mashak over the testatrix. The issues on this appeal do not require a detailed account of the evidentiary background of the case. On the trial, the evidence in that respect was substantially as set out in the Court of Appeals opinion, supra. Essentially, it showed that, beginning in 1944, Mashak had represented the testatrix in involved and protracted litigation involving the estate of the father of testatrix' first husband, Dr. Horace Reddish. The litigation was eventually terminated in 1952 by a decree by which the contestant here was awarded a ⅔ interest in fee in farm land in Jersey County, Illinois, and the testatrix a ⅓ interest in fee, with provision that testatrix should receive ¾ of the income during her life and contestant ¼ during such time. The proponent, whose contract with the testatrix called for him to receive 50% of any recovery for the testatrix, thereafter participated actively with the testatrix in the management of the farm property.

According to Mashak's deposition, the income from the farm was received by way of checks payable to himself and testatrix. He would obtain testatrix' endorsement and

deposit the checks in his account. There was some evidence of a joint account between Mashak and testatrix out of which their share of the expenses of the farm operation were paid.

In 1954, Mashak prepared a deed which testatrix executed whereby her interest in the farm was conveyed to her husband and Mashak as joint tenants, with the income reserved to the testatrix for life. According to Mashak's deposition, a consideration of $1.00 was paid for the deed. "[W]e had a joke about it. He paid fifty cents and I paid fifty cents."

Mashak had prepared two previous wills for Mrs. Milanko. One, dated April 28, 1945, left her property to her husband. A second, dated April 23, 1948, left her estate to her husband and Mashak.

The proponent's evidence was designed to show that the testatrix was grateful to Mashak for his successful efforts on her behalf and regarded him as if he were a son. The evidence also tended to show that the testatrix denied that the contestant was her granddaughter. The contestant's evidence was intended to show essentially the regard which testatrix had for the contestant and the testatrix' wishes or understanding that, upon her death, contestant would received testatrix' interest in the farm. However, contestant's primary reliance was upon the presumption of undue influence arising from the fiduciary relationship between testatrix and proponent.

The proponent testified at the first trial of the case, but did not do so at the second. Contestant introduced as admissions against interest portions of a deposition of Mashak and answers by him to interrogatories. On this appeal, the first question presented is whether the trial court properly granted a new trial because it erred in refusing to permit the contestant's attorney, upon argument to the jury, to comment upon the proponent's failure to testify.

The rule which permits an unfavorable inference to be drawn against a party, knowledgeable of the facts of the controversy, who fails to testify and which permits such failure so to be used by an opponent in argument to the jury is well established. Dubail v. Medical West Bldg. Corp., Mo. Sup., 372 S. W. 2d 128, 133 [6]; Block v. Rackers, Mo. Sup., 256 S. W. 2d 760, 764 [5-8]; Kelsey v. Kelsey, Mo. App., 329 S. W. 2d 272, 273 [1]. A trial court's refusal to permit such argument when proper may constitute reversible error (Smith v. Kansas City Public Service Co., Mo. App., 56 S. W. 2d 838, 842-843 [6]), and will justify a trial court's granting a new trial. Adam Hat Stores v. Kansas City, Mo. App., 307 S. W. 2d 36, 41-42 [8-12]; Mo. Sup., 316 S. W. 2d 594, 600 [9].

In this case, appellant asserts various reasons for the correctness of the trial court's original ruling refusing to permit reference to appellant's failure to testify. His first reason, that there was no evidence of his exercise of undue influence over the testatrix and therefore there was no evidence which his testimony might have rebutted, is related to his argument throughout the appeal of the inapplicability of the presumption of undue influence arising from the proponent's relationship to the testatrix and his preparation of the will under which he became the sole beneficiary.

On the prior appeal, the St. Louis Court of Appeals concluded that "the evidence is sufficient to create the presumption [of undue influence] when a will leaving a substantial bequest to an attorney is shown to have been drafted and its execution supervised by him." 392 S. W. 2d 637. The court there also held that such presumption, although rebuttable, "makes a prima facie case which does not disappear upon the introduction of rebutting testimony and raises an issue for the jury. Loehr v. Starke [332 Mo. 131, 56 S. W. 2d 772], supra; Pulitzer v. Chapman, 337 Mo. 298, 85 S. W. 2d 400; Cuthbert v. Heidsieck,

Mo., 364 S. W. 2d 583." 392 S. W. 2d 636. The conclusion of the St. Louis Court of Appeals is applicable on the present appeal and we, therefore, reject the contention that there was nothing which the proponent was obliged to rebut. In this connection, we also reject the proponent's contention that application of the presumption in this case is a violation of his rights under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. As applied in the case of an attorney, the presumption has a sound basis in the public policy of discouraging transactions between an attorney and client. 7 C. J. S., Attorney and Client, § 127 b, p. 966. Its application in this case gives rise to no constitutional questions.

Proponent next contends that his testimony would have been merely cumulative, in view of an attesting witness's testimony that she overheard the conversation between proponent and the testatrix in which the testatrix requested proponent to prepare her will. According to the witness, the testatrix "said that she didn't want anyone else in the whole world but her husband, and on his death, for Mr. Mashak to get everything she had, because * * * he was responsible for everything, and been such a long friend through the years when she didn't expect to receive anything, and she said 'that's the way I want it' and her husband agreed, he said 'that's right.'" The witness further testified that, at the execution of the will, proponent read the document and the testatrix stated: "[T]hat's fine, Frank, that's just what I want." However, as a party to the litigation, with knowledge of the entire history of his relationship to the testatrix, there is no reason for the assumption that the proponent's testimony would have been merely corroborative. His conduct was the issue and he was in the best position to explain it. His failure to do so could not be excused on this ground.

Appellant further contends that he was incompetent to testify by virtue of the "dead man's" statute and because his testimony would have been precluded by the attorney-client privilege. The appellant was not a party to a contract or cause of action within the meaning of § 491.010. Therefore, the "dead man's" statute would not have precluded the appellant's testimony. Garvin's Admr. v. Williams, 50 Mo. 206, 212; Norris v. Bristow, 358 Mo. 1177, 219 S. W. 2d 367, 11 A. L. R. 2d 725; Reidinger v. Adams, Mo. Sup., 266 S. W. 2d 610, 612-613 [2]; Wilhoit v. Fite, Mo. Sup., 341 S. W. 2d 806, 818 [22-24]. The attorney-client relationship having terminated with the death of the testatrix would have been no bar to proponent's testimony. Thompson v. Ish, 99 Mo. 160, 12 S. W. 510, 513-514; Walton v. Van Camp, Mo. Sup., 283 S. W. 2d 493, 499 [4].

Finally, appellant's assertion that he was "available" as a witness to be called by the contestant is no answer. Availability is not a factor governing the right to comment when a party, as distinguished from a non-party witness, does not testify.

Had the trial court's conclusion on the motion for new trial been that the contestant was not adversely affected by his trial ruling because of the availability of the proponent's deposition, answers to interrogatories and testimony on the previous trial, a different question might have been before us (see Wipfler v. Basler, Mo. Sup., 250 S. W. 2d 982, 989). In accordance with our practice in affording greater liberality in favor of an order awarding a new trial, we conclude that the trial court's ruling here was not erroneous.

This conclusion would be sufficient to cause us to affirm the order appealed from. However, we also note the trial court's ruling regarding objections to instructions given at the trial.

Although there were no MAI forms designed particularly for a will contest case, the parties and the court sought to comply with Civil Rule 70.01 (e), V. A. M. R., MAI No. 2.01 was given as Instruction No. 1. Instruction No. 2, offered by the plaintiff, called for a verdict for the plaintiff if the jury believed that the defendant exercised undue influence over the testatrix in the execution of her will. Instruction No. 3 was defendant's converse of this instruction.

Instruction No. 4 was the MAI burden of proof instruction, No. 3.01. Instruction No. 5 set out the presumption of undue influence upon which plaintiff relied. Instruction No. 6 defined "confidential and fiduciary." Instruction No. 7 authorized a finding of undue influence from circumstantial evidence. Instruction No. 8 told the jury that undue influence was not required to have been proved by overt acts at the very time of execution of the will. Instructions Nos. 4 through 8 were offered by plaintiff.

Instructions Nos. 9 through 13 were offered by defendant. We will give more detailed attention to No. 9 in our consideration of the trial court's sustaining the motion for new trial for error in this instruction. Instruction No. 10 defined "undue influence." The instruction then told the jury that "the plaintiff must prove to the jury by a preponderance of the credible evidence that undue influence * * * was actually exercised and exerted over the mind of testatrix by the defendant * * *." Instruction No. 11 told the jury that the testatrix was under no legal duty to mention plaintiff in her will. Instruction No. 12 told the jury that they were not to substitute their views of what testatrix should have done. Instruction No. 13 was MAI No. 2.02.

Instruction No. 14, offered by the court, was the jury verdict form.

Among the grounds for new trial which the court sustained was one alleging error in giving defendant's Instruction No. 10 on the grounds that it misdirected the jury on the burden of proof and was inconsistent with plaintiff's Instruction No. 5. Instruction No. 10 should not have been given in view of the limitation upon burden of proof instructions, set out in the Notes on Use to MAI No. 3.01.

The trial court also found proponent's Instruction No. 9 erroneous. That instruction told the jury that testatrix had the right to consult whomever she wished for the preparation of her will and that if she did employ proponent for such purpose and he prepared her will in accordance with her intentions and directions, the testatrix was not obliged to seek the aid of any other person to revise or review her will. We think that the trial court properly concluded that the instruction tended to confuse, not clarify, the issues. Whether or not a testator does obtain independent advice is a factor for consideration when a will is prepared for the beneficiary. See In Re Wood's Estate, 374 Mich. 278, 132 N. W. 2d 35, 5 A. L. R. 3d 1. However, it is only an evidentiary factor, not a conclusive factor, and there was no occasion in this case to call particular attention to such factor by an instruction.

The order granting a new trial is affirmed.

Robert R. Welborn,
Commissioner.

Houser, C., Concurs,
Higgins, C., Concurs.

Per Curiam: The foregoing opinion by Welborn, C., is adopted as the opinion of the Court.

Henley, P. J., Seiler and Holman, J. J., concur;
Storckman, J., not sitting when cause was submitted.

APPENDIX B.

Memorandum of Trial Court Granting New Trial. R. pp. 2 to 6, Incl. of Supplemental Transcript of Record on Appeal (R. 636 to 640).

Memorandum.

The Court's ruling on grounds Nos. 6 and 7 of the Motion for a New Trial was based on the following:

The Dead Man's Statute does not apply in a will contest. Garvin Adm's v. Williams, 50 Mo. 206. The Court has checked this case in Shepard's Citator and the above ruling has never been reversed.

If there be any doubt about the Dead Man's Statute not applying in the case at bar, the defendants waived any right to rely on it by introducing the testimony of Henry Shaw and Mabel Shaw by way of depositions. These parties testified at length as to conversations and statements made by Mrs. Milanko.

As to the privilege of attorney and client, it would be a strange law that would draw a presumption of undue influence against an attorney and then preclude him from testifying about matters surrounding the will.

Only admissions were read from the deposition of Mr. Mashak and the case of Block v. Rackers, 256 S. W. 2nd 760 is controlling.

Refusal to permit argument, that an unfavorable inference should be drawn against a party for failure to call a friendly witness having personal knowledge of facts in issue, is reversible error. Smith v. Kansas City Public Service Company, 56 S. W. 2nd 838.

With reference to grounds No. 8 of plaintiff's Motion for a New Trial: Instruction No. 9 is erroneous for the reason that it states Milanko retained Mashak as her

attorney to write her last will in accordance with her directions and intentions. This instruction should have included the element "and if you find that he did not exercise undue influence over her". This instruction was misleading and erroneous in that it attempts to submit and highlight some of the issues to the jury, but does not submit all the issues. While this instruction does not in express terms purport to direct a verdict it was unnecessary for it to do so if it is of such a character as to confuse the minds of the jury as to the issues. See Mansfield Lumber Company v. Johnson, 91 S. W. 2nd 239; Moran v. C B & Q Railroad Company, 255 S. W. 331, as holding an instruction of this nature positively erroneous.

Plaintiff's Motion for a New Trial was sustained as to ground No. 9 referring to Instruction No. 10 for the following reason. A presumption arises that the testator has been unduly influenced by the beneficiary charged therewith when the evidence shows: (1) that a confidential relationship existed between the testator and beneficiary; (2) that by terms of the will the fiduciary has been given a substantial bequest; and (3) that the fiduciary was active in procuring the execution of the will. **When supported by probative evidence the presumption makes a prima facie case which does not disappear upon the introduction of rebutting testimony and raises an issue for the jury.** (Emphasis supplied.) Pasternak v. Mashak, 392 S. W. 2nd 631.

In the foregoing case the opinion at page 637 states **"that the evidence is sufficient to create the presumption when a will leaving a substantial bequest to an attorney is shown to have been drafted and its execution supervised by him".** Evidence of the foregoing, to-wit: substantial bequest to an attorney who is shown to have drafted and supervised the execution of the will is all that is necessary to create the presumption of undue influence,

which does not disappear upon the introduction of rebutting testimony and raises an issue for the jury.

Instruction No. 10 defined undue influence as follows: "The Court instructs the Jury that 'undue influence' as used in these instructions means such influence as amounts to overpersuasion, coercion or force, overpowering and destroying the free agency and will power of the person upon whom it is used, and that no amount of influence or advice or persuasion which comes short of such effect will amount to undue influence; and that the mere influence of affection or attachment, or desire to gratify the wishes of one beloved, respected and trusted by the testatrix Elizabeth Milanko, does not constitute undue influence within the meaning of the law."

Under the facts of the case at bar, the definition of undue influence as set forth was erroneous and misleading to the jury. In the body of the instruction the contestants were required to prove by a preponderance of the evidence the elements outlined in the defining part of the instruction.

Instruction No. 10 was taken from the case of Clark v. Powell, 175 S. W. 2nd 842. In that case the beneficiary of the will was not an attorney and he did not draft the will. Instruction No. 10 is in conflict with Instruction No. 5. Instruction No. 5 was based on the law as set forth in Pasternak v. Mashek, supra.

Rules as to burden of proof are important and indispensable in administration of justice and constitute a substantial right of party on whose adversary burden rests, and they should therefore be jealously guarded and rigidly enforced by the Court. Highfill v. Brown, 320 S. W. 2nd 403.

/s/ J. Casey Walsh,
J. Casey Walsh,
Judge.

APPENDIX C.

A summary of pertinent testimony follows:

The Second Jury Trial began April 25, 1966.

Dorothy Stallings (R. 83), an attesting witness to the Will, testified that she met Testatrix in 1957; that Testatrix stated in the presence of Testatrix' husband ". . . she wanted everything to go to her husband, and upon his death, she said that she wanted it to go to Mr. Mashak (Proponent)" (R. 88); that Testatrix' husband also wanted his Will made and "He said that he wanted everything to go to Bessie (Testatrix), and in case of her death, then he wanted Mr. Mashak to have everything they had" (R. 90); that Testatrix asked her to be a witness on the Will and took down her 'phone number (R. 90, 91); that Testatrix called witness and requested her to come to Testatrix' home to witness the Will (R. 91); that the Will was read out loud to Testatrix in the presence of independent legal counsel and Testatrix' husband, that the Will was handed to Testatrix, that Testatrix read it, and she said "that's fine, Frank (Proponent), that's just what I want" (R. 93, 94); that the independent legal counsel, Mr. Walker, who also served as a witness was present and that said independent legal counsel questioned Testatrix upon her understanding, and that she was sure of everything, before he consented to serve as a witness (R. 94); that Testatrix "was very alert" (R. 97); that she had observed Testatrix previously and at Testatrix' home at the time of the execution of the Will, that Testatrix was "in a neat little house dress, her home was very orderly", "she was active, nothing wrong with her at all" (R. 97, 98).

Irwin Walker (R. 110), an independent legal counsel and attesting witness to the Will chosen by Testatrix, testified that he was an attorney, 64 years of age, and had been

practicing law for 38 years (R. 110); that he had been a witness on the Will, and had seen the Testatrix sign the Will (R. 111); that the Will had been read to her, given to her and she had looked it over (R. 112) in the presence of her husband (R. 112); that the Testatrix had called him up and asked him to act as a witness (R. 113); "that I told Mrs. Milanko that there was some responsibility in acting as a witness, and if she was sure that she knew what she was doing, that she was familiar with the property that she was disposing of, and how she was disposing of it, and she said she was. I remember too that she turned to her husband and said, 'this is the way I want this Will drawn, because I don't want you running over to East St. Louis and throwing your money away', some such words as that" (R. 114); that he also witnessed the husband's Will, and as a lawyer of 38 years experience, having examined her as to her testamentary capacity, "I would definitely say that she was of sound mind" (R. 114); that witness signed in the presence of Testatrix and in the presence of the other witness (R. 114).

John Gibbons testified (R. 155) he had been Contestant's attorney in December, 1951, when a conference was had in the United States District Court at Springfield, Illinois (R. 158), where negotiations were had prior to a settlement decree in the Jersey County Circuit Court in 1952 in Jerseyville, Illinois (R. 161), that Testatrix had said: "to the effect she wanted enough of their share of the trust for a living for the rest of her life, and after that it should go to Dorothy Delores, her granddaughter" (R. 162).

Beatrice Kipp (R. 164) testified for Contestant that she became acquainted with Testatrix through her aunt (Mrs. Fannie Schroeder) who lived across the hall from her (R. 164); that after the death of Testatrix' husband in 1959, witness called Testatrix on the phone and asked Testatrix to sell witness the farm Testatrix owned in **Jersey-**

ville, Illinois (R. 165, 169); and Testatrix on the 'phone then told witness she could not, "because she had a granddaughter" (R. 169); that witness did not make Testatrix any proposition to buy the place (R. 172); that witness hadn't seen the farm (R. 175); that her aunt (Mrs. Fannie Schroeder) knew that Testatrix had "this farm, and that . . . and I thought maybe I might buy it from her" (R. 179).

Fanny Schroeder (R. 187) testified for Contestant that she lived "across the back porch" from Testatrix (R. 188); that she often talked with Testatrix and "She just always talking about her granddaughter and said when she died the place went back to the granddaughter, is what she told me" (R. 189) in answer to the question ". . . do you remember saying that you never talked to me before?", witness testified "No—yes. I'm crazy. Yes, I said it, I talked to you twice" (R. 194); when asked to state her name, witness testified "If I can think about it, Fanny Schroeder" (R. 202).

Josephine Ebner (R. 213), witness for Contestant. When asked whether she knew Testatrix during her (Testatrix') lifetime testified "Oh, no, just while I lived here" (R. 214); testified of Testatrix that "The poor thing was sick all the time, she would have to go to the hospital all the time because she was sick" (R. 218) and in answer to the question of how many times, to her own knowledge, Testatrix was at the hospital, testified "I know two, already I know two times when I lived over there, and I know when I lived over there" (R. 219).

Frank Mashak, Proponent (R. 233), testified that he had been employed by Testatrix in July 1944 to represent Testatrix in her claim against the estate of Stephen M. Reddish, that as a result of his efforts a decree of the Circuit Court of Jersey County, Illinois was entered some eight years later which resulted in a victory for Testa-

trix and that in accordance with their agreement Testatrix and Proponent jointly operated their portion of the farm which came to them by the decree (R. 248); that Testatrix and Proponent had two tenant farmers together with Contestant who farmed their portion of the farm (R. 249); that Proponent was not related to nor was he a confidante of Testatrix (R. 254); that she used her own independent judgment; that at the beginning of her case, she had paid him twenty-five dollars (R. 254) and that subsequently there were no payments, he "worked on a contingent basis" (R. 255); that the Will in contest was signed in the Testatrix' home in the presence of her husband, and an independent legal counsel (Irwin Walker) and one other attesting witness (R. 255, 256); that Testatrix kept the Will and it was obtained by the Executor after her death over 29 months later (R. 257); that Testatrix herself handled "Her bank account, her money, and her property. Whatever she may have had" (R. 259); that after her husband died in February (21st) of 1959, she went to the hospital sometime after the middle of the year of 1959 and witness had one thousand dollars "that I paid on bills that was in a special account . . ." (R. 259); that witness had preserved the checks issued on her behalf from that special account when she was in the hospital shortly before her death (R. 260); that she died in a nursing home three days after having been sent there by her physician, Dr. Joseph C. Edwards (R. 260); that the money for the joint operation of the farm was kept in a joint account; that witness never had authority to draw on Testatrix' savings account at First National Bank (R. 263, 264); that witness was not the beneficiary of Testatrix' insurance policies, that the beneficiary of those policies was Testatrix' husband; who predeceased her by some ten months, and that the proceeds of those policies are in a savings account, as reflected by the inventory in the estate and also in the settlement (R. 265, 266); that

there was "A considerable question" of Testatrix obtaining any interest in the property in Jersey County, that there were various suits and numerous lawyers presenting conflicting claims to Testatrix' interest (R. 272, 273, 274, 275).

Dorothy Dolores Pasternak, Contestant (R. 278), testified that she did not ever remember seeing her father (R. 279); that she had never seen Testatrix (R. 280); that she left St. Louis for California at age 3 (R. 280); that for one year, when she was eleven or twelve she returned to live in St. Louis, that she never saw Testatrix during that year (R. 281); that she received sixteen thousand dollars from the settlement of the case won by Proponent for Testatrix (R. 286); that she never knew Testatrix (R. 289); that she had never gone to Jerseyville to visit with any of her relatives (R. 292); that in a previous case she testified that she was fourteen when she had visited St. Louis (R. 294); that she didn't remember the name of the school she attended in St. Louis during the period she was here, and she thought it was the eighth grade (R. 296); that she didn't remember what year she had spent here visiting her aunt and uncle (R. 298); that she had never written to Testatrix, that she had never called Testatrix by the telephone; that she did not know whether Testatrix was dead or sick (R. 298, 299); that she didn't know where her lawyer in this case lived, that she had never gone to his office (R. 308); that she had never read Testatrix' Will before filing this suit (R. 311); that she doesn't know anything about whether Testatrix was capable of understanding, realizing or appreciating the disposition of her property by Will, as alleged in Contestant's petition herein (R. 312, 313, 314); that she knew nothing of her (Contestant's) allegation in her Petition that Testatrix was not of sufficient mind and mental capacity to understand and comprehend the value of the property (R. 315); that she didn't know anything

about ". . . whether Frank Mashak (Proponent) ever exercised any persuasion or influenced her in any way, or enticed and induced her to do anything with that property now . . ." (R. 317); that Contestant didn't know what Testatrix thought, didn't know whether Testatrix was a strong-willed person, or a weak-minded person (R. 318); that Contestant's land interest in the case won for Testatrix by Proponent, was sold by Contestant's guardian for thirty-five thousand dollars, and that it was Contestant's money (R. 322); that the deed Contestant executed recited a consideration of "ten dollars and other good and valuable consideration in hand . . ." (R. 324); that said property was sold to Contestant's lawyer and his wife (R. 324); that Contestant later sued her own lawyer and his wife over that interest she had sold them and received "an additional ten thousand dollars" (R. 326).

Joseph C. Edwards, M. D. (R. 420), personal physician to Testatrix, testified that he was a graduate of Harvard University Medical School, specializing in internal medicine and heart disease (R. 420); that he first examined and treated Testatrix in 1948 and that she had hypothyroidism (R. 421) which could be treated with thyroid extract administered orally and that her condition responded to that treatment (R. 422); that in 1948 "she was perfectly capable of giving a good history and account of herself" (R. 423); that the Testatrix was observed by witness from 1948 until her death in 1959, that she was hospitalized for nineteen days in 1948 (R. 423); that in August of 1957 until September 7th, 1957 she was hospitalized for "hepatitis, inflammation of the liver, without jaundice" (R. 424); that upon her hospitalization in August of 1957, her condition did **not** "affect her mind to the extent that she didn't know and understand the everyday affairs of life" and ". . . she was able to give a good account of her history and her illness at that time

to the intern and myself . . .", that she was coherent, and that she was "mentally competent to transact her every day business" . . . "up until a few months before her death" (R. 424); that as of July 3rd, 1957 (the date of execution of the Will) she was mentally competent (R. 425); that Testatrix was capable of making decisions of her own (R. 426); that she did her own shopping, buying, settling of accounts and that "I would say during the time that I saw her, she was fairly strong mind, that she could make her own decisions" (R. 428); that at various times she had stomach upset (R. 435, 436); that there was no evidence of senility until "the last, I would say two or three months before her death, and then one could not be certain of senility, or that she did become more confused then" (R. 459, 460); that during 1957 "she was doing quite well" (R. 474).

Hubert Shaw (R. 358) testified that he had known the Testatrix since 1945 (R. 367) and was her tenant from 1954 (R. 359); that he would see her from twelve to fifteen times a year (R. 371); that she had told him "the land will be Frank's (Proponent's) some day" (R. 373 and 533); that many times she said that Dorothy Dolores Pasternak (Contestant) "was not her granddaughter" (R. 374, 530, 536); that he had conducted many business transactions with her (R. 375) and that her mental condition was "sharp" (R. 375); that the quit-claim deed executed in 1954 deeding the property to Testatrix' husband and Proponent but retaining a life interest for herself was given to witness by the Testatrix personally in July of 1955 to be recorded by him at his convenience (R. 380) and that the Testatrix' husband was present when the witness received the deed to be recorded and that her husband acquiesced and directed the manner in which the deed was to be returned after recording (R. 380, 381); and that Proponent was going to receive the property on her death (R. 394).

Mildred Frye (R. 335) testified that Testatrix lived next to her mother and that she knew Testatrix (R. 337) from 1955 to her death in 1959 and had been in Testatrix' home many times (R. 339); that "she (Testatrix) was a nice clean person, I'd say that about her, she kept herself very well, you know, she cleaned her clothing and things, and she kept her house straight, and she kept it clean and everything" (R. 340); that "she could read and write, very well" and that she "used to read to my mother" different articles out of the newspaper that interested her and she would read and explain it to witness' mother (R. 341); that ". . . she had a very good mind" and "She knew what she was doing at all times" (R. 342).

Zellie Hollis (R. 396) testified that he knew Testatrix from 1955 when they lived in the same building until her death (1959) (R. 397); that he visited the Testatrix and her husband about twice a week (R. 400, 401); that Testatrix was able to go any place she wanted, that she kept her home "real nice," that she was neat and clean (R. 402); that she bought papers every day, that witness saw her reading them (R. 403, 405); that "she (Testatrix) made all the decisions . . ." (R. 406); that Testatrix was "strong in her decisions" (R. 407); that Miss Fanny Shroeder: (Contestant's witness) ". . . lushed pretty good," that she drank intoxicating liquor, that he had seen Miss Fanny (Shroeder) intoxicated many times (R. 409, 410).

Louie Dean Ray (R. 486) testified that she lived in the same building with Testatrix and her husband from 1955 and that she knew them until their deaths in 1959 (R. 488); that she was able-bodied and able to do her own work until a "couple of weeks before she left to go into the nursing home" (R. 490); that Testatrix read interesting articles to her (R. 491); that she discussed

her college work with her and Testatrix was interested in a course in Local Flora she took at college and Testatrix knew a lot of the names of plants and leaves (R. 492); that she said she had a son who had died and no other relatives (R. 493); "she was a very free-hearted person," helped her in her school work (R. 494) and paid her tuition at Harris Teachers College (R. 495); that she handled her own money (R. 495); that Mrs. Schroeder (Contestant's witness) always drank an intoxicating concoction called Cream of Kentucky and that she called Mrs. Schroeder the "Cream of Kentucky Bandit" and that Mrs. Schroeder made arrangements with the nearby store to have her pick it up for Mrs. Schroeder (R. 497); that Testatrix was neat with respect to personal hygiene and appearance (R. 498); and Testatrix "she would do what she wanted to do" (R. 499).

Velma Hollis (R. 503) testified that she knew the Testatrix and her husband from 1955 until their deaths (R. 503, 504); that they visited back and forth as they lived across the hall (R. 504); that Testatrix would visit the farm and bring back produce which she would give her (R. 508); that Testatrix had a son, who "had been married, but she said he didn't have no children" (R. 508); that Testatrix "thought an awful lot of him (Proponent)" and ". . . she was talking to me about her sickness, you know, and her property, and her husband, and she told me she had everything fixed so in case she went first, she wanted all of her property and everything to go to her husband, and in case he should pass before her, her attorney, she had it fixed so that he would get it, her belongings, her attorney (Proponent)" (R. 510, 511); that Mrs. Fanny Schroeder (Contestant's witness) was addicted to the use of intoxicating liquor and that either witness or her daughter would get it for her every day, and that it was Cream of Kentucky (R. 518); that Testatrix would read the papers to witness (R. 520).

Henry Shaw (R. 522) testified that he knew Testatrix about 48 years; that he lived on the Reddish farm 27 years (R. 524); that the Testatrix lived on that farm and he saw her nearly every day (R. 525); that Testatrix had only one child Hubert who passed away in July of 1944 (R. 528); that "She said that Hubert didn't have any daughter, so it (Contestant) couldn't possibly be his daughter. He said it couldn't possibly be his child at that time" (R. 530, 531); and "She said absolutely it wasn't Hubert's daughter" (R. 531); that "She said the property would be left to Mr. Milanko (Testatrix' husband) and to Frank (Proponent) the two of you, and after his death, it was yours, to go to Frank. She wanted Frank to have it" (R. 533).

Mabel Shaw (R. 539) testified that she knew Testatrix 48 years (R. 539); that "She told me how she had been so happy to know you (Proponent), and have you help her, that she would never have gotten any of her rightful estate, part of the estate, that you were just like a son to her, and anything that she had to leave after her death she wanted to go to you, because you (Proponent) had gotten everything for her that she ever had or ever would have" (R. 543); that Testatrix did not refer to Proponent as her son, "Not as her son, but being as good to her as her son, and taking the place of her son" (R. 546).

APPENDIX D.

Supreme Court of Missouri.

Supreme Court Rules.

December 30, 1966.

Pursuant to the authority granted by Section 5, Article 5, of the Constitution of Missouri 1945, it is ordered that the following Canons of Judicial Ethics be adopted as the First Rule of this court and be numbered 1.01 through 1.37 effective March 1, 1967, and that the adoption of Rule One be brought to the attention of the Bench and Bar in the February 1967 issue of the Journal of The Missouri Bar:

Rule 1.19. Judicial Opinions.

In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

It is desirable that appellate courts in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.

But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be published judges may well take this fact into

consideration, and curtail them accordingly, without substantially departing from the principles stated above.

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.

Reported in Missouri Cases 407-408 S. W. 2d XIX, XXII, and Vernon's Annotated Missouri Statutes, 1967, Pamphlet No. I, p. VI, supplement to 1966 pocket parts.

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No. 896.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

FRANK MASHAK,
Petitioner,

vs.

DOROTHY DELORES PASTERNAK,
Respondent.

BRIEF

Of Dorothy Delores Pasternak in Opposition to Petition for Certiorari.

JEROME F. DUGGAN,
SIDNEY W. HORWITZ,
DUBINSKY & DUGGAN,
705 Chestnut Street,
St. Louis, Missouri 63101,
Attorneys for Respondent.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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OPINIONS BELOW.

The opinion of the Supreme Court of Missouri, dated July 12, 1967, has not been reported as of December 29, 1967, for the reason that on date of September 15th, 1967, the Supreme Court of Missouri granted petitioner's Motion for an order to Stay Mandate for ninety (90) days.

Said opinion will probably appear in 420 S. W. 2nd . . .; however, the opinion is set forth in petitioner's Petition for Writ of Certiorari under designation Appendix A. The memorandum opinion of the trial Judge is unreported (referred to by petitioner as R. 636 to 640), and printed as Appendix B in Petition for Certiorari (A-9).

Petitioner has notified respondent of the date of filing of his Petition and of the Docket Number of the case in this Court. However, he has failed to indicate on said notification form the contents of the record filed, as provided by Supreme Court Rule 21 (2). Hence, respondent cannot refer to page numbers of the record in the lower Court beyond Page 633, and reference to the Supplemental Transcript of the Record on Appeal.

JURISDICTION.

The judgment of the Supreme Court of Missouri of July 12, 1967, is not subject to review in this Court, for the reason that no final judgment or decree has been rendered by the Supreme Court of Missouri, as will hereinafter more fully appear, within the purview of the jurisdictional statute of the United States Supreme Court, 28 U. S. C., Section 1257 (3).

STATUTE INVOLVED.

28 U. S. C. 1257 (3) provides:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is

drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

QUESTION PRESENTED.

Does the United States Supreme Court have jurisdiction to entertain a Petition for a Writ of Certiorari from the judgment of the Supreme Court of Missouri, when said judgment does not terminate the litigation between the parties on the merits of the case or affect any rights or privileges of petitioner?

STATEMENT.

Respondent, Dorothy Delores Pasternak, formerly Dorothy Delores Reddish, is the granddaughter and sole heir at law of the testatrix, Elizabeth Milanko. Respondent instituted this Will Contest action against petitioner as the beneficiary and executor of the Estate of Elizabeth Milanko, deceased, in the Circuit Court of the City of St. Louis on September 19, 1960 (R. 2-9).

Trial was had by jury in said Court, and on April 19, 1963, the verdict and judgment of the jury and Court found that the instrument in writing dated July 3, 1957, was not the Last Will and Testament of Elizabeth Milanko, deceased. An appeal was taken to the Supreme Court of Missouri by instant petitioner. The Missouri Supreme Court transferred said appeal to the St. Louis Court of Appeals on jurisdictional grounds. **Pasternak v. Mashak, Mo. Sup., 383 S. W. 2d 760.** The St. Louis Court of Appeals reversed and remanded the case for retrial on the ground that the evidence was insufficient to warrant a submission of an instruction on testamentary capacity, but sufficient to warrant a submission on the issue of undue influence. **Pasternak v. Mashak, Mo. App., 392 S. W. 2d 631.**

The second trial again occurred in the Circuit Court of the City of St. Louis, wherein a verdict and judgment was rendered in favor of proponents of the Will on April 29, 1966 (R. 623). Instant respondent filed her timely motion for new trial (R. 624-629), and said motion was sustained by the Trial Court (R. 631). The Trial Court filed in said cause its memorandum opinion in support of its action setting aside the judgment. (Supplemental Record pgs. 2-6; Appendix B, Pages A-9 to A-12.)

The instant petitioner, individually and as executor of the Estate of Elizabeth Milanko, deceased, perfected their

appeal to the Supreme Court of Missouri (R. 631, 632). On July 12, 1967, the Supreme Court of Missouri affirmed the judgment of the Trial Court awarding respondent a new trial. **Mo. Sup., Pasternak v. Mashak, 420 S. W. 2d ... (Appendix A, A-1 to A-9).**

ARGUMENT.

Title 28, U. S. C., Section 1257 (3) sets forth the jurisdiction of the United States Supreme Court to review judgments of the highest State Court. It specifically provides that a final judgment or decree may be reviewed by writ of certiorari under certain circumstances. In **Market St. Ry. Co. v. Railroad Commission, 65 S. Ct. 770, l. c. 773, 324 U. S. 548, 89 L. Ed. 1171,** this Court said:

> "Our justification to review a State Court judgment is confined by long-standing statute to one which is final. * * * Final it must be in two senses: it must be subject to no further review or correction in any other State tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final Court."

Obviously, the judgment of the Supreme Court of Missouri affirming a new trial in this Will Contest action does not constitute a final determination of the litigation between the parties. See also **Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co., 73 S. Ct. 196, 344 U. S. 178, 97 L. Ed. 204,** and **Gospel Army v. City of Los Angeles, 67 S. Ct. 1428, 331 U. S. 543, 91 L. Ed. 1662.**

Petitioner does not lose his right to seek a review in this Court if a subsequent decision is rendered adversely to him in the State Supreme Court. **Urie v. Thompson, 69 S. Ct. 1018, l. c. 1025, 337 U. S. 163, 93 L. Ed. 1282.**

The decision rendered by the Supreme Court of Missouri is based upon adequate and independent State grounds. Petitioner's claim to a constitutional question arises solely on the theory that he, as a lawyer, has not been afforded the equal protection clause of the 14th Amendment to the Constitution of the United States. The Supreme Court of

Missouri held that petitioner's application of the 14th Amendment to this case gives no rise to a constitutional question, inasmuch as the relationship of attorney and client is one that should be zealously guarded by the Courts and is based on the public policy of discouraging transactions between attorneys, who stand in a fiduciary or confidential relationship, with a client. **Pasternak v. Mashak, Mo. Sup., 420 S. W. 2d ...,** reproduced in the Appendix A of the Petition (Pages A-1 to A-9, l. c. A-5).

It has been the position of this Court that it will not entertain a review of a State Court judgment which rests on independent and adequate State grounds, even where the judgment also decides Federal questions. **Henry v. State of Mississippi, 85 S. Ct. 564, 379 U. S. 443, 13 L. Ed. 2d 408.**

The substantive law of Missouri relative to a presumption of undue influence where an attorney or anyone having a confidential or fiduciary relationship with a testator, profits as the result of his being active in procuring or assisting in the preparation and execution of a Will, is well-entrenched. A landmark case is **Loehr v. Starke, 332 Mo. 131, l. c. 142, 56 S. W. 2d 772, l. c. 776,** where the Supreme Court of Missouri said:

> "The presumption under consideration is not a mere legal fiction or procedural rule. It arises on a substantial basis of fact or inference. The presumption and fact or inference go hand in hand and really are the same thing. Hence, the presumption, with its underlying facts or inferences, once being in the case, never does or can disappear but raises an issue for the jury."

Similar cases are **Cuthbert v. Heidzieck, Mo. Sup., 364 S. W. 2d 583; Laspy v. Anderson, Mo. Sup., 361 S. W. 2d 680, l. c. 682.** In the latter case the Supreme Court of Missouri held:

"The law is well-established in this state and elsewhere that public policy dictates the necessity to protect the confidential and fiduciary attorney-client relationship. Consequently, when a conveyance from a client to an attorney is attacked, it is considered presumptively fraudulent and the burden is upon the attorney to prove by convincing evidence that the transaction evidenced by the conveyance as well as the conveyance itself was free and equitable in every respect,"

It is therefore evident that not only is the petition for writ of certiorari in this instant case premature, it is also obvious that no constitutional question, whether of the United States or the State of Missouri is involved; and since this Court has adhered to the principle that it will not review judgments of State Courts that rest on substantial State grounds, certiorari will not lie. **Herb v. Pitcairn, 65 S. Ct. 459, 324 U. S. 117, 89 L. Ed. 789.**

CONCLUSION.

For the reasons stated above, it is respectfully submitted that the Petition for Writ of Certiorari be denied at cost of petitioner.

Respectfully submitted,

JEROME F. DUGGAN,

SIDNEY W. HORWITZ,

DUBINSKY & DUGGAN,
Attorneys for Respondent.

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

FRANK MASHAK,
4114 Olive Street,
St. Louis, Missouri 63108,
Counsel for Petitioner.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101: CEntral 1-4477.

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In Reply to Respondent's Brief that no final judgment has been entered in this case, it omits the Constitutional questions raised in the trial court before the second jury trial, which were briefed and argued on appeal, and summarily rejected by the Missouri Supreme Court on the hitherto unknown "public policy" invented by the court for the purpose. The Missouri Supreme Court has with finality closed off any consideration at the state level of

Petitioner's rights under the United States and Missouri Constitutions. It has disobeyed the Missouri Constitution, 1945, **V. A. M. S., Article V, § 9,** which provides:

> **"Section 9. Transfer of Causes to Supreme Court En Banc.**—A cause in the supreme court shall be transferred to the court en banc when the members of a division are equally divided in opinion, or when the division shall so order, or on application of the losing party when a member of the division dissents therein, *or a federal question is involved,* or pursuant to supreme court rule." (Italics ours.)

After Petitioner timely filed his Motion for a Rehearing or to Transfer the Cause to the Court en banc which was overruled on September 11, 1967 (R. 707, 710; Petition for a Writ of Certiorari herein, pages 2 and 10) the judgment became final insofar as Petitioner could go in the state courts, Rule 83.16, Missouri Rules of Civil Procedure (effective April 1, 1960), Vernon's Annotated Missouri Statutes.

The result of a third retrial has been predetermined by the decision of the Missouri Supreme Court on the erroneous basis that constitutional questions do not exist merely because they chose to "reject" them. The trial court must follow the final decision of the Missouri Supreme Court and when the constitutional questions are again raised, either before, or in the third retrial of the case in the trial court, would avail nothing and would be futile, because the trial court would reject such constitutional questions raised again, on the obvious grounds that the decision complained of is the "law of the case" and *res adjudicata,* and binding on the trial court.

Where the Supreme Court of Missouri will not obey the mandate of the Missouri Constitution, 1945, Article V, § 9, V. A. M. S., aforesaid; will not follow its own Code

of Judicial Ethics, Rule 1.19, Missouri Cases, 407-408 S. W. 2d XIX, XXII; will not consider evidence, but substitutes presumptions without basis in fact for evidence; will not establish proper guidelines or standards to regulate another trial of the same issues after repeated requests, and creates a new "public policy" to overthrow established case law, and summarily rejects constitutional questions, is not the outcome of the next trial inevitable?

This situation is analogous to the facts recited by Justice Black in **Mills v. State of Alabama,** 384 U. S. 214, at 217, 218. As we read said case, where the result of a retrial is inevitably futile, the judgment ordering said retrial is "final" within the meaning of 28 U. S. C. § 1257 (3). That is the situation in the instant case.

The Supreme Court of Missouri has refused to consider the evidence. It has listed the combination of three presumptions which although entirely theoretical and against the evidence, all spring from Petitioner's admission that he wrote the Will, to form an insurmountable obstacle to his inheriting. The court has spelled out that "his conduct is the issue" without evidence, creating another presumption detrimental to him on a third trial. The rejected Constitutional questions, now *res adjudicata,* will not be available in the future, and the decision will not allow Proponent to win in the third trial under these conditions. For these reasons the result is inevitable, and hence the judgment is "final" according to **Mills v. State of Alabama,** *supra,* 384 U. S. 214, at 217, 218, and this Court under its discretionary power has jurisdiction to issue certiorari under 28 U. S. C. § 1257 (3). The questions raised are of public importance and are of such nature that the exercise of such power is peculiarly appropriate, **Ex Parte Republic of Peru,** 318 U. S. 578, 582, 586.

CONCLUSION.

For the reasons set forth in the original petition, petitioner prays the petition for a writ of certiorari be granted.

Respectfully submitted,

FRANK MASHAK,
4114 Olive Street,
St. Louis, Missouri,
Counsel for Petitioner.